UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DR. SAMAN B. CHUBINEH,
on behalf of plaintiff and the class defined herein,

Plaintiff,

v.

Case No: 17-cv-00229

SNAPPAYS MOBILE, INC., doing business as PAPAYA PAYMENTS, SILICON VALLEY BANK, MASTERCARD INTERNATIONAL, INC., and JOHN DOES 1-10,

Jury Trial Demanded

Defendants.

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff, Dr. Saman B. Chubineh, respectfully requests, pursuant to Fed.R.Civ.P. 23(a) and (b)(3), that this Court enter an order determining that this action may proceed as a class action against defendants SnapPays Mobile, Inc., doing business as Papaya Payments ("Papaya"), Silicon Valley Bank ("Silicon"), and Mastercard International, Inc. ("Mastercard").

Pursuant to Fed.R.Civ.P. 23(a) and (b)(3), plaintiff seeks certification of a class consisting of (a) all persons (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. §1658), (c) were sent faxes similar to Exhibit A.

. . .

Plaintiff further requests that he be appointed class representative and that Tiffany N. Hardy of Edelman, Combs, Latturner & Goodwin, LLC and Christopher Lestak be appointed counsel for the class.

In support of this motion, plaintiff states:

1. Plaintiff Dr. Saman B. Chubineh brings this action to secure redress for the actions of defendants in sending or causing the sending of unsolicited advertisements to telephone facsimile machines in violation of the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA").

2. On March 14, 2017, Dr. Saman B. Chubineh received the unsolicited fax advertisement attached as Exhibit A on his facsimile machine.

3. The fax header states that it was sent by "SnapPays Inc.," which is defendant SnapPays Mobile, Inc., doing business as Papaya Payments.

4. The fax announces the availability and quality of products and services marketed on a commercial basis by SnapPays Mobile, Inc., as shown by Exhibit B.

5. The products and services are marketed by SnapPays Mobile, Inc., in partnership with MasterCard and Silicon Valley Bank.

6. The product and services are normally sold but were provided free to the first 500 doctors as a means whereby defendant could promote the acceptance of the product and services.

7. Plaintiff had no prior relationship with defendants and had not authorized the sending of fax advertisements to plaintiff.

8. The TCPA makes unlawful the "use of any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine ..." 47 U.S.C. §227(b)(1)(C).

9. The TCPA provides for affirmative defenses of consent or an established business relationship. Both defenses are conditioned on the provision of an opt out notice that complies with the TCPA. *Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013); *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013). The fax attached as Exhibit A does not comply.

10. The class is so numerous that joinder of all members is impractical. Plaintiff alleges on information and belief, based on the generic nature of the fax, that there are more than 40 members of the class. In light of the number of doctors in New York, plaintiff estimates the number of class members at 500 or more.

11. There are questions of law and fact common to the class that predominate over any questions affecting only individual class members. The predominant common questions include:

a. Whether defendants engaged in a pattern of sending unsolicited fax advertisements;

b. The manner in which defendants compiled or obtained its list of fax numbers;

c. Whether defendants thereby violated the TCPA.

12. Plaintiff will fairly and adequately protect the interests of the class. Plaintiff has retained counsel experienced in handling class actions and claims involving unlawful business practices. Counsel's qualifications are set forth in Exhibit C. Neither plaintiff nor plaintiff's counsel have any interests which might cause them not to vigorously pursue this action.

13. Plaintiff's claims are typical of the claims of the class members. All are based on the same factual and legal theories.

14. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of class members in individually controlling the prosecution of separate claims against defendant is small because it is not economically feasible to bring individual actions.

15. Notice can be readily given by fax and/or mail. Since the fax is one intended for medical practitioners, their names and addresses are readily available from public sources, such as state licensing records and the National Provider Index.

16. Numerous courts have certified class actions under the TCPA. *Holtzman v. Turza,* No. 08 C 2014, 2009 WL 3334909 (N.D.Ill. Oct. 14, 2009), *aff'd in part, rev'd in part, vacated in part,* 728 F.3d 682 (7th Cir. 2013); *Ballard RN Center, Inc. v. Kohll's Pharmacy and Homecare, Inc.* 2015 IL 118644, 48 N.E.3d 1060; *American Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 757 F.3d 540, 544 (6th Cir. 2014); *In re Sandusky Wellness Center, LLC*, 570 Fed.Appx. 437, 437 (6th Cir. 2014); *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 998 (8th Cir. 2016); *Sadowski v. Med1 Online, LLC,* No. 07 C 2973, 2008 WL 2224892 (N.D.Ill. May 27, 2008); *CE Design Ltd. v Cy's Crabhouse North, Inc.*, 259

F.R.D. 135 (N.D.Ill. 2009); *Targin Sign Sys. v Preferred Chiropractic Ctr., Ltd.*, 679 F. Supp. 2d 894 (N.D.Ill. 2010); *Garrett v. Ragle Dental Lab, Inc.,* 10 C 1315, 2010 WL 4074379 (N.D.Ill., Oct. 12, 2010); *Hinman v. M & M Rental Ctr.,* 545 F.Supp. 2d 802 (N.D.Ill. 2008); *Clearbrook v. Rooflifters, LLC*, 08 C 3276, 2010 U.S. Dist. LEXIS 72902 (N.D. Ill. July 20, 2010) (Cox, M.J.); *G.M. Sign, Inc. v. Group C Communs., Inc*., 08 C 4521, 2010 WL 744262 (N.D. Ill. Feb. 25, 2010); *Kavu, Inc. v. Omnipak Corp.,* 246 F.R.D. 642 (W.D.Wash. 2007); *Display South, Inc. v. Express Computer Supply, Inc.,* 961 So.2d 451, 455 (La. App. 1st Cir. 2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.*, 992 So. 2d 510 (La. App. 1st Cir. 2008); *Lampkin v. GGH, Inc.*, 146 P.3d 847 (Ok. App. 2006); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. (App.) 94, 50 P.3d 844 (2002); *Core Funding Group, LLC v. Young*, 792 N.E.2d 547 (Ind.App. 2003); *Critchfield Physical Therapy v. Taranto Group, Inc.*, 293 Kan. 285; 263 P.3d 767 (2011); *Karen S. Little, L.L.C. v. Drury Inns. Inc.,* 306 S.W.3d 577 (Mo. App. 2010).

17. Management of this class action is likely to present significantly fewer difficulties that those presented in many class actions, e.g. for securities fraud.

18. Plaintiff is filing a class motion with the complaint because it is the practice of defendants in such cases to tender relief to the named plaintiff and thereby create defenses to certification.

19. In *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015), the court overruled the holding of *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011), that such tenders could moot a class, but specifically cautioned that:

> Rejecting a fully compensatory offer may have consequences other than mootness, however. As we put it in *Greisz v. Household Bank*, 176 F.3d 1012, 1015 (7th Cir.1999), "[y]ou cannot persist in suing after you've won." Although even a defendant's proof that the plaintiff has accepted full compensation ("accord and satisfaction" in the language of Rule 8(c)(1)) is an affirmative defense rather than a jurisdictional bar, the conclusion that a particular doctrine is not "jurisdictional" does not make it vanish. The question raised by *Greisz* and similar opinions is whether a spurned offer of complete compensation should be deemed an affirmative defense, perhaps in the nature of an estoppel or a waiver. That would be consistent with Rule 68, which is designed for

> offers of compromise (the normal kind of settlement) rather than offers to satisfy the plaintiff's demand fully. Cost-shifting under Rule 68(d) is not necessarily the only consequence of rejecting an offer, when the plaintiff does not even request that the court award more than the defendant is prepared to provide.

Chapman v. First Index, Inc., 796 F.3d 783, 787 (7th Cir. 2015).

20. Despite the recent ruling by the Supreme Court in *Gomez v. Campbell-Ewald Co.*, No. 14-857, 136 S.Ct. 663, 193 L.Ed.2d 571, 2016 WL 228345 (2016), that an unaccepted offer of judgment does not moot a class action, a question remains as to "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id.* at *8. Based on the quoted language, defense counsel are encouraging the making of such tenders. (Exhibits D-F) Some courts are accepting the argument. *Fulton Dental, LLC v. Bisco, Inc.,* No. 15 C 11038, 2016 WL 4593825 (N.D. Ill. Sept. 2, 2016); *Lourens v. Volvo Cars of N. A., LLC,* No. 16 C 4507, 2016 WL 5944896 (N. D. Ill. Oct. 13, 2016). Consequently, plaintiff submits that the interests of the class require immediate filing of a class motion.

21. In support of this motion, plaintiff is submitting the accompanying memorandum of law.

WHEREFORE, for the reasons stated above and in plaintiff's supporting memorandum, this Court should certify this case as a class action case.

Respectfully submitted,

/s/ Tiffany N. Hardy
Tiffany N. Hardy

Tiffany N. Hardy
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CERTIFICATE OF SERVICE

I, Tiffany N. Hardy, hereby certify that on March 15, 2017, a true and accurate copy of the foregoing document was filed via the Court's CM/ECF system. I further certify that the foregoing document will be sent to a process server to be served upon the following parties, along with the summons and complaint in this matter:

SnapPays Mobile, Inc
C/O National Registered Agents, Inc.
160 Greentree Drive, Suite 101
Dover, DE 19904

Silicon Valley Bank
3003 Tasman Drive
Santa Clara, California 95054

Mastercard International, Inc.
2000 Purchase Street
Purchase, New York 10577.

s/Tiffany N. Hardy
Tiffany N. Hardy